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Nos. 332 and 430

In the Supreme Court of the United States

OCTOBER TERM, 1964

LOUIS GLADSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

MAX MANNY ELGISSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 332

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OPINION BELOW

The opinion of the court of appeals is reported at 334 F.2d 103.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964. Gladstein's petition for a writ of certiorari (No. 332) was filed on July 29, 1964. Elgisser's petition for a rehearing was denied by the court of appeals on July 27, 1964. His petition for a writ of certiorari (No. 430) was filed on August 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the officers arresting petitioner Elgisser had reasonable grounds to believe that he was in the possession of merchandise stolen from interstate freight.

2. Whether the trial court properly submitted to the jury the substantive charge of possessing goods stolen from interstate freight after dismissal of a conspiracy charge.

STATUTES AND RULES INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or

which are a part of or which constitute an interstate or freight shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

18 U.S.C. 3052 provides as follows:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Rule 8, F.R. Crim. P., provides as follows:

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions

connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, F.R. Crim. P., provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioners and three co-defendants were indicted in the United States District Court for the Southern District of New York for conspiracy to steal from interstate freight and for the substantive offense of possessing merchandise thus stolen, in violation of 18 U.S.C. 371, 659. Co-defendants Pitts and Cogdell pleaded guilty and testified for the government in the joint trial of petitioners and defendant Manin. Following the court's dismissal of the conspiracy count at the conclusion of all the testimony, the jury found defendants guilty on the charges of possession. Petitioners Gladstein and Elgisser were sentenced to im-

prisonment for three years and two years, respectively (R. 792-793). The court of appeals affirmed. *United States* v. *Elgisser*, 334 F.2d 103.

1. Both petitioners moved to suppress as evidence the merchandise allegedly stolen from interstate commerce which was seized incident to their arrest. Only Elgisser (No. 430) presses the point in this Court. On the hearing of their motion to suppress, it was shown that on the morning of December 11, 1961, information was received by the office of the Federal Bureau of Investigation in New York City from a confidential informant who had furnished reliable information in the past that a Reo truck with a red cab and a blue body parked in the vicinity of the Boston Post Road in the Bronx contained rubber boots and phonograph records that had been stolen from upstate New York (H. Tr. 40-42).[1] Agent Griffin P. Martin, who so testified, stated that he himself did not know who the informant was (H. Tr. 44). Martin caused inquiry to be made of the Albany office, which advised that the Crowe and Co. truck terminal had been burglarized over the weekend and that cartons of rubber boots moving in interstate commerce had been stolen (H. Tr. 42).

A truck answering the foregoing description was located shortly thereafter on Cruger Avenue just off the Boston Post Road in the Bronx. Martin kept the truck under observation from about 1:00 p.m. until

[1] "H. Tr." refers to the transcript of the hearing of petitioners' motion to suppress. "Tr." refers to the trial transcript.

about 4:00 p.m. He was then relieved by four other agents, to whom he conveyed the information which he had already received (H. Tr. 40-43, 7, 9-10, 14, 16-17, 61-62, 66). Shortly after 5:00 p.m., agents parked some distance to the rear of the truck saw petitioner Elgisser get into the body of the truck (H. Tr. 6, 50). One of the agents knocked and called, "F. B. I." Elgisser opened the door. In one hand he was holding a pair of children's rubber boots and in the other a flash light. No search was then made of the truck, but the agents saw through the open door that there was an open carton containing children's rubber boots and a number of unopened cartons (H. Tr. 51-53, 63). The agents did not then inform Elgisser that he was under arrest but in effect arrested him by requiring him to enter their car, which was driven to the next block and turned around for further observation of the truck (H. Tr. 54). The agents who were conducting a moving surveillance of the truck in the other car were notified by radio of the observation of the boots and the fact that Elgisser was in custody (H. Tr. 64, 19).

A few minutes later, the truck pulled away from its parking spot (H. Tr. 19, 54). The agents in the moving car pulled abreast and stopped the truck. The driver, petitioner Gladstein, said that the truck did not belong to him, but had been left with him several weeks earlier for sale and that he was taking it to find a place to park in some service station. So far as he knew, the truck was empty and he said he had no objection to the agents looking in. The agents opened the door and saw the cartons and a

number of loose children's boots on the floor. Gladstein said that he had not seen the merchandise before (H. Tr. 19-20, 33-34). On these facts, the court denied the motion to suppress (H. Tr. 68).

2. At the trial, events over a five-day period beginning Wednesday, December 6, 1961, were described. Defendant Pitts testified for the government that on this date he had a conversation with defendant Manin in New York City relating to the sale of stolen dresses (Tr. 27) in which defendant Cogdell, who also testified for the government, participated. Cogdell spoke to petitioner Elgisser, who said that he would take anything they could get (Tr. 38-40, 231-232). Elgisser bought twenty of the stolen dresses and asked how many more Cogdell could get. When Cogdell said that he needed a truck, Elgisser replied that that was no problem (Tr. 42-47). Manin said that "Johnny" in Albany was supposed to have a truckload of dresses. Elgisser responded that he did not care where they came from (Tr. 47-48).

Elgisser then directed the three men to a junkyard in the Bronx, where they met petitioner Gladstein. Gladstein said that he did not trust Elgisser and that, in the future, they should deal with him directly. Gladstein said that he could buy or use merchandise like the dresses. He showed them a Reo truck with a red cab and a blue body, which he said would be ready to go the next afternoon. He provided them with a set of license plates, gave them a number to call when they returned and warned them to be careful (Tr. 50-58, 242-247).

On Friday evening, Pitts and Manin drove the truck to Albany. They met "Johnny", but were unable to obtain anything from him. On Saturday night they found a door open at Crowe and Co., a trucking concern, and loaded their truck with cartons they found there which contained rubber boots, phonograph records and clothing (Tr. 58-67, 270). Upon their return to New York City Sunday morning, they notified Cogdell. He called the number given by Gladstein and was directed to take the truck to an address in the Bronx (Tr. 70-71, 248).

On Monday, Cogdell tried to collect from Gladstein, who turned him down, saying that he had given $500 to Manin and that was all that he could pay (Tr. 249). On Monday afternoon, the truck was located by F. B. I. agents near Gladstein's junkyard, followed by the arrest of both petitioners as already described (*supra*, pp. 6-7). Elgisser made a statement to the F. B. I. agents which incriminated Gladstein, but did not sign it (Tr. 357-359, 408, 419, 425). Following Gladstein's arrest in the Reo truck, which he said he was taking to find a parking lot, it was driven to the junkyard, where there was ample space for it. It contained a number of cartons of children's rubber boots, phonograph records and other items (Tr. 373-377). Gladstein then took the agents to a store which he operated, where a number of similar cartons were found containing the same kind of articles (Tr. 378). The cartons on the truck and in the store were identified as missing from Crowe and Co. in Albany (Tr. 270, 284, 362-365, 376, 379, 400-406).

At the conclusion of the government's evidence, petitioners moved for acquittal on both the conspiracy and the substantive charges. The court sustained the motion as to the conspiracy count but denied it as to the substantive counts. The court also refused to grant a mistrial because of dismissal of the conspiracy count, saying that it would instruct the jury, limiting consideration of the evidence received on this charge (Tr. 464-468). No evidence was introduced by petitioners.

ARGUMENT

1. There was ample basis for crediting the information received from an unidentified confidential informant that a Reo truck having a red cab and blue body was parked in a described locality and contained items stolen in upstate New York. A call to the Albany F. B. I. office corroborated the accuracy of the report and furnished further information as to the time and place of the theft, and the fact that the articles were moving in interstate commerce. Additional substantiation was given when a truck of this rather unusual description was spotted in the area described. Cf. *Draper* v. *United States*, 358 U.S. 307, 311-313.

After petitioner Elgisser was seen to enter the body of the truck, agents approached the truck and called, "F.B.I.". Elgisser responded by opening the door. He was holding a pair of children's rubber boots at the time and additional boots could be seen within. Without any search whatever, there were then reasona-

ble grounds to believe that Elgisser was in possession of some of the stolen articles. The contents of the truck could then properly have been seized, but were not touched until Gladstein had implicated himself by driving the truck away from its parking place. Incidental to his arrest and with his permission, the truck was searched without, however, revealing substantially more than had already been apparent when Elgisser had appeared at the open door of the truck.

In view of the abundant substantiation furnished before the arrest, it is unnecessary to consider the independent sufficiency of the information obtained from the confidential informant whose name was not disclosed and whose reliability was not fully explained. The arresting officers did not act on the information alone, but waited until it had been substantially corroborated. Adding facts uncovered by the officers to the reasonably trustworthy information they had been given, they were clearly warranted in believing that an offense was being committed in their presence. *Brinegar* v. *United States*, 338 U.S. 160, 175-176.

2. The court properly denied the motion for mistrial based upon dismissal of the conspiracy charge. There is no hard-and fast rule that when a conspiracy count fails, joinder is error as a matter of law. *Schaffer* v. *United States*, 362 U.S. 511, 516. See, also, *Fernandez* v. *United States*, 329 F.2d 899, 905 (C.A. 9); *United States* v. *O'Brien*, 319 F.2d 437, 439 (C.A. 7); *United States* v. *Rabin*, 316 F.2d 564, 568 (C.A. 7), certiorari denied, 375 U.S. 815; *United*

States v. *Kaufman*, 311 F.2d 695, 698 (C.A. 2); *Dykes* v. *United States*, 313 F.2d 580, 581 (C.A. D.C.), certiorari denied, 374 U.S. 837. The transactions here involved plainly constituted part of a common scheme or plan within Rule 8, F. R. Crim. P. Whether a severance should be granted rests within the sound discretion of the trial court. Rule 14, F. R. Crim. P.; *Opper* v. *United States*, 348 U.S. 84, 95.

There is no merit to petitioners' contention that the joinder of conspiracy with substantive charges was made in bad faith. *United States* v. *Manfredi*, 275 F.2d 588, 593 (C.A. 2), certiorari denied, 363 U.S. 828. The evidence supports the view that Elgisser authorized the men making the trip to bring back whatever might be available, regardless of source. The rather ambiguous language of Gladstein would also seem to grant a similar broad commission (*supra*, p. 7). The situation here is comparable to that in which the implied understanding was that whiskey be stolen from any source which might prove convenient or accessible, where the court held that this would include an interstate shipment and thus support a federal charge. *Clark* v. *United States*, 213 F.2d 63, 64-65 (C.A. 5). Compare also *Pereira* v. *United States*, 347 U.S. 1, 11-12, 14. There is no adequate basis for disregarding the finding of the courts below that joinder was in good faith.

Following the dismissal of the conspiracy charge, the court gave clear and comprehensive instructions limiting the jury in their consideration of testimony as to various conversations, to which no objections

were made.[2] Only three defendants were tried together, so the danger of transference of guilt was small. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 772-773. There was no serious possibility of confusion on the part of the jury, as the evidence against each petitioner was clearly delineated and impressive. *United States* v. *Berling*, 324 F.2d 249, 253 (C.A. 7), certiorari denied, 376 U.S. 955.

Furthermore, the evidence clearly sustained the inference that petitioners engaged with the other de-

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[2] The court instructed (Tr. 535-536):

> Secondly, there was considerable testimony which I permitted in evidence on the representation that the government was going to connect it later on. This related generally to the conspiracy count, which is no longer in the case, and to a large extent related to conversations that Mr. Pitts had with Manin, sometimes called California, and conversations with Mr. Cogdell and also related to conversations that Cogdell had with Pitts and Manin.
>
> If the government had proved the conspiracy, according to the way I understand the law, the conversations by conspirators could be admissible against all the conspirators even though they were not present. But since I have dismissed the conspiracy you must disregard that testimony and consider only the testimony that relates to specific defendants and only those conversations had with a specific defendant and in that defendant's presence. Now, this does not exclude any conversations that Mr. Pitts or Mr. Cogdell made with the defendant Elgisser as long as you remember that it can be considered by you only with regard to the defendant Elgisser and not relating to Gladstein. It also does not exclude any conversations Pitts or Cogdell had with the defendant Gladstein, but you must consider that such conversations are to be considered by you only with regard to Gladstein and not with regard to Elgisser.

fendants in an illegal conspiracy, the only question being whether the agreement contemplated a violation of federal law. In these circumstances, the agency of each to act and speak for the others in the execution of the common plan did not depend upon a formal charge of conspiracy and limiting instructions were not, in fact, necessary: *United States* v. *Sapperstein*, 312 F.2d 694, 698 (C.A. 4); *United States* v. *Olweiss*, 138 F.2d 798, 799 (C.A. 2), certiorari denied, 321 U.S. 744.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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